



August 28, 2001

Mr. Stephen R. Zastrow
Police Legal Advisor
Corpus Christi Police Department
321 John Sartain
Corpus Christi, Texas 78401

OR2001-3793

Dear Mr. Zastrow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151287.

The Corpus Christi Police Department (the "department") received a request for information concerning (1) a criminal matter involving a named individual and a specific location, and (2) information pertaining to an impounded vehicle driven by a named person. You state that the department does not have any information pertaining to item (2). We note that the Public Information Act (the "Act") compels disclosure of public information that is in existence, but it does not require a government entity to prepare or assemble new information in response to a request. *See* Gov't Code § 552.002 (defining "public information" as that "collected, assembled, or maintained" by a government body); *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 268 (Tex. Civ. App. – San Antonio 1978, writ diss'd) (ruling that a government agency could not be required to make copies of documents no longer in its possession). You further state that the requestor has been provided a copy of basic "front page" information. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Subsections 552.301(a) and (b) provide:

- (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within

one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You acknowledge that the department failed to submit its request for a decision within the ten business day period mandated by section 552.301(a).

Furthermore, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the written request for information. Gov't Code § 552.301(e)(1)(B). You did not, however, submit to this office a copy of the written request for information. See Gov't Code § 552.301(e)(1)(B).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). In this instance, you have not presented this office with a compelling reason as to why the requested information should be withheld pursuant to section 552.108. We therefore deem your section 552.108 claim waived.

However, because you contend that the information concerns the privacy interests of third parties, we will consider your arguments under section 552.101. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Judicial decisions hold that information is protected by common law privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has also recognized that the release of personal information can constitute "a clearly unwarranted invasion of personal privacy," under "special circumstances." Open Records Decision No. 123 (1976). An imminent threat of physical danger, as opposed to a generalized and speculative fear of harassment or retribution, is one such "special circumstance." Open Records Decision No. 169 (1977). A determination of "special circumstances" can only be made on a case-by-case basis, with the initial determination made by the governing body. *Id.* at 7.

You state that many parties involved in this case are active members of an ongoing criminal street gang, and that the gang members commonly commit acts of violence and retaliation. You further state that the purpose of such violence is to “discourage people from cooperating with law enforcement efforts, hamstringing prosecutions, and leaving the gang members free to attend to their criminal pursuits.” Finally, you state that “[v]iolent retaliation in this instance is not just a vague concern raised because of gang affiliations, but is a real and distinct possibility given the parties’ previous propensity to carry out acts of retaliation.” After considering your arguments and reviewing the submitted information,¹ we find that you have demonstrated an imminent physical danger which would constitute such “special circumstances.” Thus, the department must withhold the requested information under section 552.101 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

¹ We note that the department has submitted samples of police offense reports in support of its section 552.101 “special circumstances” claim. Consequently, we do not rule on these documents.

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Yen-Ha Le', with a stylized flourish at the end.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

Ref.: ID# 151287

Enc.: Submitted documents

c: Mr. Michael C. F. White
2554 Lincoln Boulevard #209
Marina Del Rey, California 90291
(w/o enclosures)